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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~6150~~ 70-5045

DONALD LINDSEY, *et al.*,

Appellants,

— v. —

DOROTHEA M. NORMET, *et al.*,

Appellees.

On Appeal From the United States District Court
For the District of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NEW HAMPSHIRE LEGAL ASSISTANCE.

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INDEX

Motion for Leave to File Brief *Amicus Curiae* and Statement of Interest of the *Amicus* 2

Brief *Amicus Curiae* 5

Statement of the Case 5

Introduction and Summary of Argument 5

Argument

BY THEIR PROCEDURAL STRUCTURE OREGON AND NEW HAMPSHIRE EVICTION STATUTES WHEN APPLIED TO INDIGENT TENANTS ARE A DENIAL OF FUNDAMENTAL RIGHTS PROTECTED BY THE CONSTITUTION OF THE UNITED STATES 9

Conclusion 12

Appendix

The New Hampshire Revised Statutes Annotated, Chapter 540, Actions Against Tenants 15

TABLE OF AUTHORITIES

Cases:

Boddie v. Connecticut, 401 U. S. 371 (1971) 8

Briand v. Wild, 110 N. H. 373, 268 A. 2d 896 (1970) 11

Harrington v. Harrington, Me., 269 A. 2d 310 (1970) 11

Kline v. Burns, 111 N. H. ____, 276 A. 2d 248 (1971) 12

Meltzer v. G. Buck LeCraw & Co., 39 U.S.L.W. 3483 (May 3, 1971) 9

Weeks v. Sly, 61 N. H. 89 (1881) 7

Wilder v. Kneeland, 94 N. H. 185, 49 A. 2d 506 (1946) 10

Woodbury v. Butler, 67 N. H. 545, 38 A. 379 (1894) 12

Constitutional Provisions:

United States Constitution

First Amendment 5
Fifth Amendment 5
Ninth Amendment 5
Tenth Amendment 5
Fourteenth Amendment 5

New Hampshire Statutes:

RSA 48-A 13
RSA 540 ..... 6, 9
RSA 540:2 7
RSA 540:3 7
RSA 540:12 7
RSA 540:13 (supp.) 7, 9
RSA 540:14 (supp.) 7
RSA 540:17 (supp.) 10, 12
RSA 540:18 (supp.) 10
RSA 540:20 (supp.) 7
RSA 540:23 11
RSA 540:24 (supp.) 11
RSA 540:25 (supp.) 7, 9, 11, 12

Other Authorities:

Laws of New Hampshire, Vol. 10, Second Constitutional Period 1829-1835, Concord, New Hampshire (1922) pp. 229-231. 6

"New Hampshire's Housing Crisis Conference Proceedings," Report of the University of New Hampshire, Durham, New Hampshire, November, 1969, p. 79 6

The Thirteenth Report of the Judicial Council of the State of New Hampshire, Concord, New Hampshire, December 31, 1970, pp. 90-97 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 6158

Donald and Edna Lindsey, and All Other Persons Similarly Situated,

Appellants,

— v. —

Dorothea M. Normet, the Honorable William C. Beers, in his Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and all Persons Similarly Situated Holding Office As Judges of The District Court of the State of Oregon for the County of Multnomah,

Appellees.

On Appeal from the United States District Court For the District of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF THE AMICUS

Movant New Hampshire Legal Assistance respectfully moves the Court for permission to file the attached brief *Amicus Curiae* for the following reasons, the reasons assigned also disclose the interest of the *Amicus:*

1. That the New Hampshire Legal Assistance is a legal service project funded by the Office of Economic Opportunity to provide free legal services for the poor of New Hampshire;

2. That as the entity charged with the primary responsibility for providing free legal services to the poor of New Hampshire, the *Amicus* represents many poor people in eviction cases. An eviction, due to the severe climate in this area during the winter months, constitutes an extremely hazardous occurrence for poor families. In addition, there is a shortage of low-income housing throughout the state;

3. That present New Hampshire eviction statutes deter the low-income tenants at will from having meaningful access to court and a fair hearing in court on their defenses to an eviction action;

4. That the decision of the Court on the constitutionality of the challenged statutes in the case of *Lindsey v. Normet* will have a substantial effect on the eviction laws of New Hampshire which are similar to those of the State of Oregon;

5. That counsel for Appellants and the Appellee Beers have consented to the filing of a brief *Amicus Curiae* by the movant. Counsel for the Appellee Normet has not consented.

WHEREFORE, movant prays that the attached brief *Amicus Curiae* be permitted to be filed with the Court.

Respectfully submitted,

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ATTORNEYS for New Hampshire
Legal Assistance

IN THE

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BRIEF AMICUS CURIAE

STATEMENT OF THE CASE

The *Amicus* adopts the "statement of the case" as set forth in the Appellants' brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief will explain the present functioning of eviction statutes in the State of New Hampshire. It is the belief of the *Amicus* that this Court's determination of the constitutional questions raised by the Appellants will have a fundamental effect on the eviction laws of New Hampshire since the Forcible Entry and Wrongful Detainer statutes, hereafter referred to as F. E. D. statutes, of Oregon are similar in procedure and in effect to those of New Hampshire.

It is not the intent of this *Amicus* to present detailed arguments on the unconstitutionality of Oregon's statutes since it is the *Amicus'* belief that the Appellants will present those arguments thoroughly. It is the intent of this *Amicus* to demonstrate to the Court that the injustices inflicted by the eviction statutes of Oregon are also inflicted by the eviction statutes of New Hampshire.

Not only does *Amicus* agree with the Appellants that such statutes violate the Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, but also *Amicus* would challenge said statutes for violating the right to petition the government for redress of grievances, as protected by the First Amendment.

There is no dispute concerning the existence of a housing crisis throughout the State of New Hampshire. There was a

Housing Crisis Conference sponsored by several state agencies at the University of New Hampshire on November 3-4, 1969. At this Conference, Governor Walter R. Peterson stated:

> "And even so informal a survey as daily reading of the classified columns of the press in our largest industrial centers appears to bear out the conclusion that adequate housing, in a quantitative sense, is not available. This is particularly the case when we consider what is needed for housing workers and their families at prevailing income levels." ("New Hampshire's Housing Crisis Conference Proceedings," Report of the University of New Hampshire, Durham, New Hampshire, November, 1969 p. 79).

Other speakers at this conference portrayed a clear and dramatic presentation of the inadequacy, unavailability, and unfitness of a substantial amount of low and moderate income housing in New Hampshire. *Amicus* contends that the present housing crisis has developed to a large degree because of our archaic eviction laws which allow a landlord to use the judicial system to continually evict tenants who have justifiable complaints and then rent again these substandard dwellings, frequently at inflated rental rates, without fear of any economic loss or penalty.

The New Hampshire statutes on evictions are set forth in Revised Statutes Annotated, Chapter 540, hereafter referred to as RSA 540, significantly entitled "Actions Against Tenants." There is no chapter entitled "Actions Against Landlords." RSA 540 has been reprinted in the Appendix. This Chapter has remained substantially unchanged since its original enactment on July 1, 1831. See the Laws of New Hampshire, Vol. 10, Second Constitutional Period 1829-1835, Concord, New Hampshire (1922) pp. 229-231.

Under the present statutes, tenancies at will may be terminated by a notice in writing to vacate the premises at a specified day, RSA 540:2. The span of time between the service of notice to vacate and the day set for vacating must be equal to the rental payment period. When nonpayment of rent is alleged as reason for the eviction, then seven (7) days' notice is sufficient, RSA 540:3.

Customarily in New Hampshire, the low-income tenant is a tenant at will and rents by the week. Therefore, such a tenant would receive seven (7) days' notice to vacate. In the event that the tenant fails to vacate on the day specified in the notice, the landlord may recover the premises without recourse to any legal process, RSA 540:12 and further, he may remove the belongings of the tenant, if this may be done peaceably. See *Weeks v. Sly*, 61 N. H. 89, 90 (1881).

However, it is the usual procedure for a landlord to commence a lawsuit in the local district or municipal court by serving a writ of summons, RSA 540:13 (supp.), which requires the physical appearance of the tenant on the return day in that local court. This writ of summons must be served at least seven (7) days prior to the return day.

Unlike most other civil lawsuits the return day of the writ of summons is the day of the trial and judgment is usually rendered on that day, RSA 540:14 (supp.). The losing tenant has three (3) days after judgment to file an appeal, RSA 540:20 (supp.), provided that sureties are furnished, RSA 540:25 (supp.). If no appeal is taken, a writ of possession, RSA 540:14 (supp.), is issued to the landlord who may take whatever steps are necessary to oust the tenant. Frequently the sheriff is given the duty to serve the writ of possession on the tenant to insure that the tenant vacates the premises at once.

In New Hampshire there are ten superior courts, one for each county, and sixty-eight local courts which are designated as either district or municipal. Eviction actions must initially be commenced in these local courts and not in a superior court.

The latest Report of the Judicial Council of the State of New Hampshire, December 31, 1970, pp. 90-97, lists the number of landlord and tenant actions entered in the local courts. In 1968 there were 476 such actions and in 1969 there were 607 actions. The number of all civil actions, i.e. not only landlord and tenant but other civil actions, which were transferred for trials to the superior courts in 1968 was 13 and in 1969, the number was 60.

Landlord actions against a low-income tenant are rarely transferred for a trial *de novo* to superior court because of the financial inability of the low-income tenant to post the required sureties. This failure to have meaningful access to the courts denies fundamental rights to protect a basic need for life such as shelter.

The New Hampshire eviction statutes are analogous to Oregon's F. E. D. statutes. The eviction statutes of these states prevent the indigent tenant from a free and meaningful access to the courts because of the nature of the procedural steps before, during, and after the eviction trial in the local court. The affluent tenant can avoid the injustices of these procedural steps since such a person can afford the required bond in order to secure a trial *de novo* in a superior court.

This Court recognized in *Boddie v. Connecticut*, 401 U. S. 371 (1971), the principle that free access to the courts is fundamental to the protection of certain rights. The rights

involved in *Lindsey v. Normet* are exactly analogous to those in *Boddie, supra.*

First, the interest in habitable housing is fundamental.

Second, the judicial system is the exclusive remedy for adequate protection of these fundamental rights.

The bond requirements of Oregon and New Hampshire, just as the filing fees in *Boddie, supra,* seriously inhibit the protection of fundamental rights which only access to the courts can protect. See Mr. Justice Black writing in *Meltzer v. G. Buck LeCraw & Co.*, 39 U. S. L. W. 3483 (May 3, 1971.)

ARGUMENT

BY THEIR PROCEDURAL STRUCTURE OREGON AND NEW HAMPSHIRE EVICTION STATUTES WHEN APPLIED TO INDIGENT TENANTS ARE A DENIAL OF FUNDAMENTAL RIGHTS PROTECTED BY THE CONSTITUTION OF THE UNITED STATES.

Commencing with the preliminary procedures prior to the eviction trial, RSA 540 is defective. It is not necessary that a New Hampshire landlord give specific pleadings in the writ of summons, RSA 540:13 (supp.).

Further, there is no provision in the New Hampshire eviction statutes for any continuance. It is the experience of the *Amicus* that if a New Hampshire tenant seeks a continuance, the local court denies such request and informs the tenant that he may have all the time he needs by furnishing the sureties pursuant to RSA 540:25 (supp.), and thereby taking an appeal to the superior court where he will

receive a trial *de novo*, *Wilder v. Kneeland*, 94 N. H. 185, 49 A. 2d 506 (1946).

The New Hampshire tenant also suffers from an insufficient time to prepare for a defense to the eviction action. Customarily the span of time in New Hampshire from the service of the notice to vacate to the trial in the local court is about two to three weeks.

In the local courts of New Hampshire, tenants are not provided a fair hearing on their defenses. Such defenses as housing code violations, failure of consideration, unclean hands, illegality of contract, and retaliatory eviction have never been recognized as defenses to the termination of a tenancy at will in New Hampshire. The New Hampshire Supreme Court has never decided any case which involved those defenses. It has been the experience of the *Amicus* that when such defenses are raised, the local trial court requires the tenant to litigate those defenses in the superior court.

The only recognized defenses to the eviction of a tenant at will are that the landlord did not give a proper notice to quit or that he failed to make a demand for rent if the eviction is based on nonpayment of rent, or that there was an improper service of the writ of summons.

In New Hampshire, equitable defenses can be raised in the superior court. Tenants are usually unsuccessful in attempting to present equitable defenses in the local court.

If the tenant chooses to raise the issue of title, then no trial is had in the local court, RSA 540:18 (supp.). The local court must then require the tenant to furnish sureties and to pay all rent then due or which shall become due pending the trial of the matter in a superior court, RSA 540:17 (supp.).

Thus the indigent tenant is deprived by this surety requirement of any trial whatsoever when the issue of title is raised. Recently, the Supreme Judicial Court of Maine held a similar Maine statute unconstitutional, *Harrington v. Harrington*, Me., 269 A. 2d 310 (1970).

On the other hand, if the issue of title is not raised in the local court, a trial will be held on the return day. Thus, although it appears that every New Hampshire tenant is afforded his day in the local court, in reality the trial is not a full and complete trial. Further the local courts are only too willing to transfer the matter to a superior court for trial if the tenant furnishes the sureties. Not only is the trial in the local court insufficient, but the judges of the local courts are usually part-time judges. In addition there are no formal rules of court applicable to these local courts, nor is there any stenographic record of the trial unless a party is willing to pay for this record. Recently, the Chief Justice of the Supreme Court of New Hampshire commented on the need to improve the procedures governing the handling of civil cases in the local courts, *Briand v. Wild*, 110 N. H. 373, 376, 268 A. 2d 896, 898 (1970).

Following the trial in the local court the losing party, be it the landlord or the tenant, is required to post sureties if he or she wishes to have a trial *de novo*, RSA 540:24 (supp.) and 25 (supp.). Rarely does a landlord lose against a tenant at will. Moreover, while the tenant must post sureties to pay damages to the landlord, the landlord is not required to post any sureties for damages. Perhaps the most blatant statute which clearly shows the preferential treatment afforded the landlord is RSA 540:23. By its provisions, the landlord may recover exemplary damages when the tenant does not prevail in the superior court. No provision exists for the tenant to recover any exemplary damages if the tenant prevails in the

superior court. See *Woodbury v. Butler*, 67 N. H. 545, 548, 38 A. 379, 380 (1894).

Whether the bond required from an indigent tenant by RSA 540:17 (supp.) and 540:25 (supp.), may be waived has not been determined by the New Hampshire Supreme Court.

However, there is hope for the indigent tenant in New Hampshire. Recently, the Supreme Court in *Kline v. Burns*, 111 N. H. _____, 276 A. 2d 248, 252 (1971), held that there exists an implied warranty of habitability imposed by law on the basis of public policy. This was a major change from the common law of New Hampshire. Thus, a tenant at will who is being evicted for nonpayment of rent may now be able to raise the defense that he does not owe as much rent, if any, as the landlord claims when there exist substandard conditions in the rented premises. Nevertheless so long as the bond statutes remain in effect, the warranty of habitability will have a minimal impact in eviction proceedings. Few tenants will expect justice since they cannot raise the required sureties. By such statutes, tenants in New Hampshire and Oregon are denied their constitutional rights.

CONCLUSION

The local trial court is quoted in *Kline v. Burns*, 111 N. H. _____, 276 A. 2d 248, 249 (1971), as stating that the tenants have the option of not entering the tenancy or vacating the premises when the latent defects become known. This opinion is not uncommon amongst those who have sufficient resources to secure alternative rentals. In most cases low-income tenants have no such alternative rentals. Low-

income tenants have few, if any, resources and frequently, many children. If they are members of a minority group, they are often victims of prejudice as well.

The argument that the low-income tenant may secure a lease is fallacious because it is a landlord's market and such leases, when given, are often in the nature of adhesion contracts. These arguments raised against the low-income tenant at will are therefore unrealistic.

The legislature of New Hampshire recognized the need and desirability of insuring adequate housing by adopting legislation granting to municipalities the power to establish and enforce minimum standards for use and occupancy of dwellings, RSA 48-A. However, even where housing codes have been adopted, public enforcement has been less than satisfactory. This recently led the City of Nashua, New Hampshire to pass an ordinance allowing private citizens to file complaints in court against landlords for housing code violations. Nevertheless, the tenant who files such a complaint still risks retaliatory eviction or an arbitrary rent increase.

So long as fossilized eviction statutes, as those of Oregon and New Hampshire, provide free access to the courts for the slum landlord but deny meaningful access for the tenant, the public policy intended by the housing codes will continue to be frustrated.

The foundation of the United States judicial system has been that disputes between litigants shall be given a complete and public forum by the adversary method. Eviction statutes of Oregon and New Hampshire are a betrayal of this adversary method, since indigent tenants cannot afford a bond to obtain meaningful access to the courts.

This Court should hold that the financial and procedural requirements of the Oregon statutes violate the Constitution of the United States. The decision of the three-judge federal district court should be reversed.

Respectfully submitted,

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ATTORNEYS for New Hampshire
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APPENDIX

The New Hampshire Revised Statutes Annotated,
Chapter 540, Actions Against Tenants.
(Annotations omitted from this Appendix)

540:1 Tenancies, Nature of. Every tenancy or occupancy shall be deemed to be at will, and the rent payable upon demand, unless a different contract is shown.

540:2 Termination of Tenancy. Any lessor or owner of lands or tenements may at any time determine any lease at will or tenancy at sufferance, by giving to the tenant or occupant a notice in writing to quit the same at a day named therein.

540:3 Notice to Quit. If a tenant or occupant neglects or refuses to pay rent due and in arrears, upon demand, seven days' notice shall be sufficient. If the rent is payable more frequently than once in three months, whether such rent is due or not, a notice equal to the rent period shall be sufficient, and three months' notice shall be sufficient in all cases.

540:4 Demand. Such demand shall be sufficient if made upon the tenant or occupant at any time after the rent becomes due and prior to the service of such notice to quit.

540:5 Service of Demand and Notice to Quit. Such notice of a demand and such notice to quit may be served by any person by a true and attested copy of the demand or notice to quit, the return of such service to be shown by an affidavit on the back thereof, and each may be served upon the tenant or left at his last and usual place of abode.

540:6 Violation of Lease. If the lessee violates the condition of a written lease notice to quit at the end of seven days shall be sufficient and equivalent to an entry of condition broken.

540:7 Demand of Rent. Where, to constitute a forfeiture for a violation of the condition of a written lease, a demand of rent is required such demand may be made as provided in section 5.

540:8 – Time of. Such demand may be made when the rent is due or while it is in arrears, but the lessor shall not demand a greater sum than the whole rent in arrears when demand is made.

540:9 Payment After Notice. No forfeiture shall be incurred for nonpayment of rent if the lessee before the expiration of the notice shall pay or tender to the lessor all rent in arrears, together with five dollars as damages and costs occasioned by his default.

540:10 Holding Over. If a lessee holds over after the expiration of a definite written lease, or a mortgagor in possession or one claiming by or under him refuses to surrender the premises after the foreclosure of the mortgage, seven days' notice shall be sufficient.

540:11 Termination by Lessee. A lessee may terminate his lease by notice in writing, in the same manner as the lessor, and the notice shall have the same effect for all purposes as a notice by the lessor to the lessee.

540:12 Possessory Action. The owner, lessor, or purchaser at a mortgage foreclosure sale of any tenement or real estate may recover possession thereof from a lessee, occupant, mortgagor, or other person in possession, holding it without right, after notice in writing to quit the same as herein prescribed.

540:13 (supp.) Writ; Service. A writ of summons may be issued, returnable before a municipal court, setting forth in substance that the plaintiff is entitled to the possession of the demanded premises, and that the defendant is in possession thereof without right, after notice in writing to quit the same, which writ shall be served seven days before the return day thereof.

540:14 (supp.) Judgment. If the defendant makes default, or if on trial it is considered by the court that the plaintiff has sustained his complaint, judgment shall be rendered that the plaintiff recover possession of the demanded premises and costs, and a writ of possession shall issue.

540:15 Neglect to Enter, etc. If the plaintiff neglects to enter his action, or fails to support it, judgment shall be rendered for the defendant for his costs.

540:16 General Issue. Under the general issue, the defendant shall not offer evidence which may bring the title to the demanded premises in question.

540:17 (supp.) Plea of Title, Recognizance. If the defendant shall plead a plea which may bring in question the title to the demanded premises he shall forthwith recognize to the plaintiff, with sufficient sureties, in such

sum as the court shall order, to enter his action in the superior court for the county at the next return day, and to prosecute his action in said court, and to pay all rent then due or which shall become due pending the action, and the damages and costs which may be awarded against him.

540:18 (supp.) Effect of Plea, etc. After the filing of such plea and the entry of such recognizance no further proceedings shall be had before the municipal court, but the action may be entered and prosecuted in the superior court in the same manner as if it were originally begun there.

540:19 Neglect to Recognize. If the defendant neglects or refuses to recognize, judgment shall be rendered against him in the same manner as if he had refused to make answer to the suit.

540:20 (supp.) Appeal. A party aggrieved by the judgment of a municipal court upon issue joined in such case may, within three days after the rendition of the judgment, appeal therefrom.

540:21 – Procedure on. The party appealing shall produce certified copies of the whole case at the court appealed to at the next return day, and either party may there offer evidence as if the cause had been originally begun therein.

540:22 Neglect to Enter Appeal. If the appellant neglects to enter his appeal or to produce such copies the court, on complaint of the appellee, shall affirm the former judgment, with additional damages and costs.

540:23 Plaintiff's Damages. If a defendant files a plea of title or appeals, and the plaintiff recovers judgment against him, the court shall cause his damages, exemplary or otherwise, including a just compensation for the use and detention of the property and for any injury thereto, to be assessed by the jury who try the issue, or otherwise, and may issue execution therefor, or the same may be recovered on the recognizance taken as before provided.

540:24 (supp.) Recognizance, by Plaintiff. The plaintiff, before his appeal is allowed, shall recognize to the defendant, with sufficient sureties, in such sum as the court may order, to enter and prosecute his appeal, and to pay such costs as may be awarded against him.

540:25 (supp.) Recognizance, by Defendant. The defendant, before his appeal is allowed, shall recognize to the plaintiff, with sufficient sureties, in such sum as the court may order, to enter and prosecute his appeal, and

to pay all rent then due or which may become due pending the suit, and such damages and costs as may be awarded against him.

540:26 Other Remedies. Nothing in this chapter shall be construed to prevent a landlord from pursuing his legal remedy at common law.

540:27 Landlord's Grantee. Whenever the estate occupied by a tenant at will or sufferance is conveyed by the landlord his grantee shall have the rights and remedies which the grantor would have had, under the provisions of this chapter, if the estate had not been conveyed.